two, and carried away the portion that stood on his land. A sued B in trespass *quare clausum fregit*. *Held*, that A can recover punitive as well as actual damages. *Bollinger* v. *McMinn*, 104 S. W. 1079 (Tex., Civ. App.).

Formerly an owner might assert his right to immediate possession by necessary force and plead his title in justification to an indictment for breach of the peace. 1 HAWKINS, P. C., 8 ed., 495. When deprived of this defense by later statutes, he still could not be sued in trespass *quare clausum fregit*. *Taylor* v. *Cole*, 3 T. R. 292; see *Harvey* v. *Bridges*, 14 M. & W. 437, 442. But it has been held that a tenant forcibly ejected may bring trespass against his landlord, because such act is criminal. *Thiel* v. *Bull's Ferry Land Co.*, 58 N. J. L. 212. The great weight of authority, however, is against such a result. *Low* v. *Elwell*, 121 Mass. 309; *contra*, *Dustan* v. *Cowdrey*, 23 Vt. 631. The minority view is based, not on sound principle, but on public policy, to preserve peace and to secure a resort to legal measures instead of physical force. The same public policy is invoked by the Texas court in the present case as the basis for allowing a mere trespasser to maintain trespass against an owner entitled to immediate possession. Such an unwarranted step beyond the view of the minority courts is *a fortiori* opposed to the great weight of decided cases.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

MATRIMONIAL DOMICILE AS A BASIS FOR DIVORCE. — Marriage is a status.[1] For many purposes a status may be regarded as an incorporeal *res* created by law. Of course, such a *res* can have no real situs, but since the state of the domicile has an especial interest therein,[2] a status is treated as if it had a situs there. Hence the law of the domicile alone may alter or terminate it.[3] This is peculiarly true of marriage. Therefore, in actions for divorce, which closely resemble actions *in rem*, domicile is an essential jurisdictional fact.[4]

Logically every marriage contains three domiciliary possibilities, (*a*) the individual domicile of the husband, (*b*) the individual domicile of the wife, (*c*) the matrimonial domicile — the place where the spouses reside as man and wife, *animo manendi*. In England the domicile of a married woman is, during coverture, merged in that of her husband.[5] She cannot obtain a separate domicile even for purposes of divorce.[6] It is also held that the husband's domicile is the single jurisdictional fact.[7] Accordingly in England the matrimonial domicile, in so far as it fails to conform to, or represents more than the domicile of the husband, is without effect upon jurisdiction. In America, however, the great weight of authority makes an exception to the general rule, and permits a

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[1] Bell *v.* Bell, 181 U. S. 175; Le Mesurier *v.* Le Mesurier, [1895] A. C. 517; State *v.* Armington, 25 Minn. 29.

[2] Wilson *v.* Wilson, L. R. 2 P. & D. 435, 442 (marriage); *In re* Goodman's Trusts, 17 Ch. D. 266, 297 (legitimacy).

[3] Scott *v.* Sandford, 19 How. (U. S.) 393 (slavery); Eddie *v.* Eddie, 8 N. D. 376 (legitimacy); Maynard *v.* Hill, 125 U. S. 190 (marriage).

[4] Domicile should be the single jurisdictional fact. See 19 HARV. L. REV. 586. This is the case in England. Le Mesurier *v.* Le Mesurier, *supra*. But in this country Haddock *v.* Haddock, 201 U. S. 562, has superadded personal jurisdiction of the libellee in certain cases.

[5] Dicey, Conf. of Laws, 127.

[6] Dolphin *v.* Robins, 7 H. L. Cas. 389. But see *infra*, note 7.

[7] Warrender *v.* Warrender, 2 Cl. & F. 488. But see Armitage *v.* Atty.-Gen., [1906] P. 135; Armytage *v.* Armytage, [1898] P. 178.

wife to obtain a separate domicile, though for purposes of divorce only.[8] Either domicile on the part of the husband,[9] or on the part of the wife,[8] confers jurisdiction on the court. And prior to Haddock *v.* Haddock,[10] a divorce obtained at either domicile was entitled to full faith and credit throughout the Union,[9] without reference either to matrimonial domicile or to personal jurisdiction of the libellee. Before that decision, therefore, matrimonial domicile, as distinguished from the individual domicile of either husband or wife, was without jurisdictional significance, precisely as it is without such significance in England today.

It is true, as a recent article points out, that certain Scotch cases had suggested that matrimonial domicile, as distinguished from the individual domiciles of the spouses at the time of proceedings, might be a basis of jurisdiction, but Le Mesurier *v.* Le Mesurier [1] swept this doctrine away. *Matrimonial Domicil*, Anon., 11 Bench and Bar 37 (November, 1907). It remained for Haddock *v.* Haddock [10] to revive this discarded view in America. That case apparently holds that, unless the divorce proceedings be brought at the matrimonial domicile, personal jurisdiction of the libellee must be superadded to individual domicile on the part of the libellant to entitle the decree to full faith and credit throughout the Union. Thus, matrimonial domicile may, in certain cases, replace individual domicile as the jurisdictional fact.

But matrimonial domicile is a most unsatisfactory basis for divorce jurisdiction. It is of necessity a domicile of choice. To create it there must be conjugal residence within the state, *animo manendi*. It may therefore never exist at all. If, then, matrimonial domicile is made the sole jurisdictional fact, there can be no divorce at all in such a case, since cohabitation after the offense, with knowledge of it, works condonation. This is a hardship on the parties, and also denies to the states in which they may have individual domiciles proper control over the marriage status. And this remains true, though the spouses have separate domiciles in the same state, since two individual domiciles added together do not make a matrimonial domicile. Nor is the situation greatly improved if the spouses obtain a matrimonial domicile, but separate prior to the offense and acquire individual domiciles elsewhere. Here a divorce may be possible if we allow matrimonial domicile, like individual domicile, to persist after abandonment until a new matrimonial domicile is established, but the injured party, *ex hypothesi*, must resort to the matrimonial domicile, to the exclusion of the state of individual domicile. In other words, neither of the states really interested by reason of domicile may grant the divorce, while the state which has ceased to be interested may do so. Such a divorce proceeding is little better than an *ex parte* action *in personam*. Yet it has been held again and again that personal jurisdiction of both parties is insufficient to sustain a divorce.[1] Under one set of circumstances, it is true, the matrimonial requirement has no ill effects. If either spouse happens to have an individual domicile in the state of matrimonial domicile, almost all American courts agree that divorce is proper, but there it is the individual domicile which saves the situation. If both kinds of domicile coincide, it is immaterial, in that particular case, which one is chosen as the jurisdictional fact. The total result is, therefore, that unless the matrimonial requirement is without effect, it prevents divorce in those states where divorce should be granted, while perhaps making it possible in that state where divorce should be denied. And surely, from a practical point of view, there is a fine Rabelaisian irony in requiring the spouses to cohabit in some state, *animo manendi*, as a condition precedent to dissolving the marital relation.

E. H. A., JR.

COMMISSION ON A SALE SUBSEQUENT TO A LETTING PROCURED BY AN AGENT. — A recent decision of the English Court of Appeal that an estate agent with whom a landowner had placed property and who had procured a

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[8] Ditson *v.* Ditson, 4 R. I. 87; Cheever *v.* Wilson, 9 Wall. (U. S.) 108.
[9] Atherton *v.* Atherton, 181 U. S. 155.
[10] 201 U. S. 562.